



Signed and Filed: September 03, 2009

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re ) Case No. 06-30904 TEC  
)  
SOPHIE H. NG, ) Chapter 11  
)  
)  
Debtor. )  
)  
JANINA M. ELDER, Chapter 11 Trustee, ) Adv. Proc. No. 07-3071 TC  
)  
Plaintiff, )  
)  
vs. )  
)  
PATRICIA ISABELLE HEWLETT, REGULO )  
CUBILLOS SIERRA, CHARLENE DELANEY )  
REAL ESTATE, INC., dba KELLER )  
WILLIAMS REALTY, and PRUDENTIAL )  
CALIFORNIA REALTY, )  
)  
Defendants. )  
)  
REGULO CUBILLOS SIERRA and )  
PRUDENTIAL CALIFORNIA REALTY, )  
)  
Third-Party Plaintiffs, )  
)  
vs. )  
)  
FRED KOOPMAN, KAYE KOOPMAN, )  
LOMBARD STREET LOAN COMPANY, WARD )  
REALTY, LOMBARD STREET EMPLOYEES )  
PLAN, and UNITED COMMERCIAL BANK, )  
)  
Third-Party Defendants. )  
)

**MEMORANDUM DECISION RE  
TRUSTEE'S MOTION TO DEEM  
MATTERS ADMITTED AND TO  
PRECLUDE PROOF OF DAMAGES**

1 **FACTS**

2 On January 19, 2007, Patricia Hewlett filed a proof of claim  
3 in the Sophie Ng bankruptcy case. The claim is a secured claim in  
4 the sum of \$1,060,000, based on Debtor's alleged breach of a May 3,  
5 2004 option contract that entitled Hewlett to purchase from Debtor  
6 a 24-unit apartment building in San Francisco located at 1385 Clay  
7 Street (the Property). Hewlett obtained the option one year after  
8 representing Ng as her real estate agent in purchasing the  
9 Property.

10 On June 29, 2007, Trustee filed a complaint in the present  
11 action, seeking to disallow Hewlett's claim on the grounds of  
12 breach of fiduciary duty, fraud, negligence, deceit, negligent  
13 misrepresentation, undue influence, and elder abuse.

14 James Attridge represented Hewlett in the adversary proceeding  
15 until April 3, 2009, when Hewlett filed a pleading substituting  
16 herself as counsel.

17 Both when Hewlett was represented by counsel and when Hewlett  
18 represented herself in pro per, Hewlett failed to respond to  
19 discovery requests properly served upon her by Trustee. Hewlett  
20 also failed to comply with an order by this court compelling her to  
21 produce documents.

22 On August 24, 2007,<sup>1</sup> Trustee served on Hewlett a first request  
23 for production of documents, and a first request for admissions.  
24 Hewlett failed to respond to Trustee's first request for production  
25 of documents. Although Hewlett did serve responses to Trustee's  
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28 <sup>1</sup> On August 23, 2007, the court entered an order allowing  
the parties to serve discovery immediately.

1 first request for admissions, her responses were served more than  
2 two weeks late.

3 On October 19, 2007, Trustee served Hewlett with a first set  
4 of interrogatories, and a second request for production of  
5 documents. Hewlett never responded to this second set of  
6 discovery.

7 Trustee brought a motion to compel Hewlett to comply with  
8 Trustee's first request for production of documents. The court  
9 entered an order on December 12, 2007 granting that motion and  
10 compelling Hewlett to produce without objection documents  
11 responsive to Trustee's first request for production of documents.  
12 Hewlett failed to comply with that order.

13 Hewlett failed to serve a response to Trustee's third request  
14 for production of documents, second set of interrogatories, and  
15 second request for admissions, served by Trustee on July 13, 2009.

16 There is nothing in the record to indicate that Hewlett sought  
17 an extension of time to respond to any of the discovery requests  
18 served by Trustee, or that she sought relief from the court's  
19 December 12, 2007 order compelling production of documents.

20 On June 4, 2009, the court held at a trial setting conference,  
21 at which Hewlett appeared on her own behalf. At the conference,  
22 the court severed for trial Trustee's objection to Hewlett's claim,  
23 set a discovery cutoff of August 14, 2009, and set a trial date of  
24 September 1, 2009.

25 On August 25, 2009, Trustee filed and served upon Hewlett a  
26 motion to disallow Hewlett's claim based on deemed admissions or to  
27 bar Hewlett from introducing evidence at trial. Trustee's motion  
28 was set for hearing on the first day of trial, September 1, 2009.

1 On August 26, 2009, Hewlett filed a Petition for Trial Extension  
2 and Jury Selection for New Attorney to Review Case. In that  
3 petition, Hewlett stated that she was in the process of retaining  
4 an attorney to represent her.

5 The court heard argument from both parties on September 1,  
6 2009. In response to Trustee's motion, Hewlett stated that she  
7 thought she had responded to Trustee's requests for documents, but  
8 despite the fact that Trustee's motion clearly raised Hewlett's  
9 failure to produce documents, Hewlett did not bring to court copies  
10 of the documents she claims to have produced or any other proof  
11 that she had produced documents to Trustee.

12 The court denied Hewlett's petition to continue the trial, and  
13 granted Trustee's motion to disallow Hewlett's claim, for the  
14 reasons stated on the record at the hearing and for the reasons set  
15 forth below.

16 **DISCUSSION**

17 1. Admissions. It is appropriate for the purpose of  
18 Trustee's objection to Hewlett's claim to deem as conclusively  
19 established all the matters covered in Trustee's second request for  
20 admissions. I find that Trustee properly served that request for  
21 admissions, that Hewlett did not timely respond to that request for  
22 admissions, and that the second request for admissions was properly  
23 limited to questions of fact and questions regarding the  
24 application of law to fact. Because Hewlett did not timely respond  
25 to the second request for admissions, the matters covered by the  
26 second request for admissions are conclusively established, unless  
27 the court, upon motion, permits the admissions to be withdrawn or  
28

1 amended. Fed. R. Civ. P. 36.<sup>2</sup> Hewlett never moved to withdraw or  
2 amend the resulting admissions, even on the first day of trial,  
3 despite being served with Trustee's motion to disallow Hewlett's  
4 claim based on her deemed admissions.

5 Had Hewlett asked to withdraw her admissions on the first day  
6 of trial, I would have denied that request. Rule 36(b) provides in  
7 relevant part that: "the court *may* permit withdrawal or amendment  
8 if it would promote the presentation of the merits of the action  
9 and if the court is not persuaded that it would prejudice the  
10 requesting party<sup>3</sup> in maintaining or defending the action on the  
11 merits." (emphasis added). For the following reasons, the  
12 circumstances do not satisfy either of the requirements of Rule  
13 36(b) and, in any event, withdrawal of the admissions should be  
14 denied as a matter of discretion.

15 Withdrawal of the admissions would not further decision of the  
16 controversy on the merits, because Hewlett has refused to  
17 participate in the pursuit of the merits through her almost  
18 complete refusal to respond to discovery. In addition to failing  
19 to respond to the second request for admissions at issue here,  
20 Hewlett failed to provide any response whatsoever to three requests  
21 for production of documents and two sets of interrogatories. Those  
22 requests for production and interrogatories asked Hewlett to  
23 identify, *inter alia*, the documents and witnesses Hewlett intended  
24 to rely upon in establishing damages. Hewlett failed to produce  
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26 <sup>2</sup> Fed. R. Civ. Proc. 36 applies to adversary proceedings.  
27 Fed. R. Bankr. Proc. 7036.

28 <sup>3</sup> "Requesting party" means the party who requested the  
admissions, not the party seeking to withdraw the  
admissions.

1 documents responsive to Trustee's first request for production of  
2 documents, even after the court entered an order compelling her to  
3 do so. Hewlett did respond to Trustee's first request for  
4 admissions, and did submit to deposition shortly before trial, but  
5 at that deposition she failed to respond in any meaningful way to  
6 the questions about her damages. In sum, to relieve Hewlett of her  
7 admissions would require Trustee to go to trial without those  
8 admissions and without any clue about Hewlett's claim for damages.  
9 Such a process would not advance the orderly and reliable  
10 resolution of the controversy on the merits.

11 Withdrawal of the admissions at this date would also prejudice  
12 Trustee, because it would have occurred on the first day of trial.  
13 See 999 v. CIT Corp., 776 F.2d 866, 869 (9th Cir. 1985). Although  
14 Trustee did not request the admissions until shortly before trial,  
15 Trustee acted reasonably in doing so, because Hewlett had refused  
16 to respond to all other forms of discovery.

17 Withdrawal of the admissions should also be denied as a matter  
18 of discretion. See Conlon v. United States, 474 F.3d 616, 624-25  
19 (9th Cir. 2007). First, Hewlett has acted in bad faith throughout  
20 the litigation. She refused to make discovery even when ordered to  
21 do so by the court, and she actively interfered with Trustee's  
22 efforts to implement a court order authorizing the sale of the  
23 Property.<sup>4</sup> Second, Hewlett is not likely to prevail on her claim

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24  
25 <sup>4</sup> Hewlett actively interfered in several ways with  
26 Trustee's efforts to market and sell the Property. First,  
27 Hewlett refused to comply with this court's order to  
28 produce documents relevant to the income and expenses of  
the Property. Second, Hewlett ignored this court's  
injunction ordering her to stay off the Property, and  
allowed her brother to occupy a unit on the Property after

1 even if permitted to withdraw her admissions. There are obvious  
2 and serious questions about the validity of the option upon which  
3 Hewlett's claim is based. Hewlett obtained the option to purchase  
4 the Property from Ng one year after acting as Ng's real estate  
5 agent in the purchase of the same Property. Ng is elderly and has  
6 limited command of English. Hewlett has produced no evidence that  
7 she advised Ng to seek independent advice regarding the  
8 transaction, despite Trustee's request for such information via  
9 discovery. Even if the option were found to be valid, Hewlett  
10 would likely be unable to support any claim for damages, as any  
11 witnesses or documentary proof she might offer would be excluded  
12 under Fed. R. Civ. P. 37(c)(1),<sup>5</sup> because they were never disclosed  
13 to Trustee. Thus, notwithstanding that Hewlett is currently not  
14 represented by counsel, the facts and circumstances of the case  
15 suggest that any request to withdraw the admissions should be  
16 denied as an exercise of discretion.

17 If Hewlett's admissions are not set aside, her claim must be  
18 disallowed, because in those admissions Hewlett acknowledges that  
19 the option to purchase is unenforceable and that she has suffered  
20 no damages.

21 2. Violation of Order Compelling Discovery. It is also  
22 appropriate to preclude Hewlett from introducing evidence to  
23 support her claim for damages as a sanction for Hewlett's failure  
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25 the court approved the sale of the Property. The court  
26 cites this conduct to show lack of mistake in Hewlett's  
27 failure to respond to discovery.

28 <sup>5</sup> Fed. R. Civ. Proc. 37 applies to adversary proceedings.  
Fed. R. Bankr. Proc. 7037.

MEMORANDUM RE MOTION TO DEEM  
MATTERS ADMITTED AND PRECLUDE PROOF -7-

1 to obey the court's December 12, 2007 order compelling Hewlett to  
2 produce documents responsive to Trustee's first request for  
3 production of documents. Preclusion of such evidence is  
4 appropriate under Fed. R. Civ. P. 37(b)(2)(A)(ii), because Hewlett  
5 failed to obey a discovery order, because no fewer than 23 of the  
6 categories of documents requested concerned information regarding  
7 the damages claimed by Hewlett<sup>6</sup>, because information concerning  
8 Hewlett's claim for damages is uniquely within Hewlett's knowledge,  
9 because Hewlett was represented by counsel at the time the  
10 discovery order was entered and violated, and because it is  
11 apparent from Hewlett's other conduct in this litigation that she  
12 acted willfully and not by mistake in failing to obey the discovery  
13 order. Hewlett bears the burden of proof on the question of  
14 damages, because Trustee has shown facts "tending to defeat" one or  
15 more elements of Hewlett's proof of claim. Lundell v. Anchor  
16 Const. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000).  
17 Absent proof of her damages, Hewlett's claim must be disallowed.

18 3. Entry of judgment. The court find there to be no just  
19 reason for delay and that judgment should be entered immediately  
20 disallowing Hewlett's proof of claim. There is a substantial  
21 possibility that denial of the claim, if not set aside on appeal,  
22 would end this lawsuit. Counsel for the other parties have made  
23 clear that there is a substantial possibility that once the present  
24 claim is resolved, Trustee may drop the other claims against  
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27 <sup>6</sup> First Request for Production of Documents, requests 9-27,  
28 39, 44, 62, 64-65.

1 Hewlett, effectively eliminating Hewlett's related third-party  
2 claims as well.

3 **\*\*END OF MEMORANDUM\*\***  
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MEMORANDUM RE MOTION TO DEEM  
MATTERS ADMITTED AND PRECLUDE PROOF - 9 -

Court Service List

Patricia Isabelle Hewlett  
132 Colon Ave.  
San Francisco, CA 94112

Jeffrey L. Fillerup, Esq.  
Luce, Forward, Hamilton and Scripps  
Rincon Center II  
121 Spear Street, Suite 20  
San Francisco, CA 94105-1582

Jeffrey R. Brown, Esq.  
P. Kurt Peterson, Esq.  
Peterson, Martin and Reynolds LLP  
49 Stevenson Street, 10th Floor  
San Francisco, CA 94105

David M. Parker, Esq.  
Parker and Crosland LLP  
700 Larkspur Landing Circle  
Suite 199  
Larkspur, CA 94939-1754

Richard E. Roby, Esq.  
Law Offices of Richard E. Roby  
1218 23rd Avenue  
San Francisco, CA 94122

Daniel Zamora, Esq.  
Law Offices of Tobin and Tobin  
500 Sansome Steet, Suite 800  
San Francisco, CA 94111

MEMORANDUM RE MOTION TO DEEM  
MATTERS ADMITTED AND PRECLUDE PROOF

-10-